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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/692,338	10/23/2003	Terri L. Butler	BP. 028 US2	8488
Kathleen R Terry <sup>7590</sup> 03/17/2008 Bioenergy Inc 13840 Johnson Street NE Ham Lake, MN 55304				
EXAMINER				
MCINTOSH III, TRAVIS C				
ART UNIT		PAPER NUMBER		
1623				
MAIL DATE		DELIVERY MODE		
03/17/2008		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/692,338

**Applicant(s)**

BUTLER ET AL.

**Examiner**

TRAVISS C. MCINTOSH III

**Art Unit**

1623

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 June 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-3 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-946)
- 3) ☐ Information Disclosure Statement(s) (PTO/SF/ICE)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

The Amendment filed 12/17/2007 has been received, entered into the record, and carefully considered. The following information provided in the amendment affects the instant application by:

Claims 4-17 have been canceled.

Remarks drawn to rejections of Office Action mailed 6/14/2007 include:

Double Patenting Rejection: which has been overcome by applicant's filing of a terminal disclaimer and has been withdrawn.

112 1<sup>st</sup> paragraph rejection: which has been overcome by applicant's canceling of the claim and has been withdrawn.

An action on the merits of claims 1-3 is contained herein below. The text of those sections of Title 35, US Code which are not included in this action can be found in a prior Office action.

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/17/07 has been entered.

*Claim Rejections - 35 USC § 112*

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-3 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. This is a new matter rejection.

In the amendment filed on 3/12/2007, applicants amended claims 1-2 to include methods of improving cardiovascular function in a subject having reduced cardiovascular function comprising administering 2-8g D-ribose 1-4 times/day for a period of at least 3 weeks. Applicants pointed to page 13, line 15 for support for the new limitations. This portion of the specification is drawn to the experimental protocol for ribose administration which consisted of administering ribose for 3 weeks. This treatment protocol of 3 weeks is not seen to support language drawn to treatment for “at least 3 weeks”, as this is any length of time more than 3 weeks long. The changing of scope, either by broadening or narrowing, can be construed as new matter as either is capable of changing the scope of what is being claimed and the broader or narrower groups must be fully supported in their entirety in the specification as originally filed.

***Terminal Disclaimer***

The terminal disclaimer filed on 9/10/2007 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of 11/118,613 has been reviewed and is accepted. The terminal disclaimer has been recorded.

***Response to Amendment***

The declaration under 37 CFR 1.132 filed 9/10/2007 & 12/17/2007 is insufficient to overcome the rejection as forth in the last Office action because: evidence of commercial success is normally considered in determining the issue of obviousness of claims under 103, not when reviewing whether the disclosure as originally filed contains support for currently amended claims. However, it is noted that:

Objective evidence of nonobviousness including commercial success must be commensurate in scope with the claims. In re Tiffin, 448 F.2d 791, 171 USPQ 294 (CCPA 1971) (evidence showing commercial success of thermoplastic foam “cups” used in vending machines was not commensurate in scope with claims directed to thermoplastic foam “containers” broadly).

If a particular range is claimed, applicant does not need to show commercial success at every point in the range. “Where, as here, the claims are directed to a combination of ranges and procedures not shown by the prior art, and where substantial commercial success is achieved at an apparently typical point within those ranges, and the affidavits definitely indicate that operation throughout the claimed ranges approximates that at the particular points involved in the commercial operation, we think the evidence as to commercial success is persuasive.” In re Hollingsworth, 253 F.2d 238, 240, 117 USPQ 182, 184 (CCPA 1958). See also Demaco Corp. v. F. Von Langsdorff Licensing Ltd., 851 F.2d 1387, 7 USPQ2d 1222 (Fed. Cir. 1988) (where the commercially successful product or process is not coextensive with the claimed invention, applicant must show a legally sufficient relationship between the claimed feature and the commercial product or process)

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to TRAVISS C. MCINTOSH III whose telephone number is (571)272-0657. The examiner can normally be reached on M-F 9:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Shaojia A. Jiang can be reached on 571-272-0627. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

TRAVISS C. MCINTOSH III  
Art Unit 1623  
March 3, 2008

/Traviss C McIntosh III/